On November 21, 2008, the Office of the Comptroller of the Currency (OCC) granted its first conditional preliminary approval of a new “shelf charter” for national banks. The charter is intended to facilitate new equity investments in failing depository institutions. The shelf charter is an inactive charter granted to an investor group that remains “on the shelf” until such time as the investor group is in a position to acquire a failing institution, or the deposit liabilities and assets of such an institution. The OCC’s “shelf charter” is an important step that should expand the pool of available buyers for failing institutions and their deposit liabilities and assets, especially since only chartered depository institutions can assume deposit liabilities from the Federal Deposit Insurance Corporation (FDIC).

Dovetailing with the OCC’s action on shelf charters, the FDIC on November 26, 2008, announced that it would, in certain circumstances, apply modified deposit insurance application processes in order to qualify interested parties for the FDIC’s failing institution bidders list. This will allow interested parties that do not currently have a bank charter to participate in the bidding process for the deposit liabilities and assets of failing institutions. To effect this process, the FDIC will consider abbreviated information submissions and applications for deposit insurance, and may issue conditional approvals of such applications, provided that the interested parties have received conditional approval for a depository institution charter (e.g., the OCC’s shelf charter) from a federal or state bank regulatory agency and otherwise satisfy applicable FDIC bid criteria.

**OCC “Shelf Charter” for National Banks**

*Overview of the "Shelf Charter" Process* – Although the OCC has not issued regulations or other guidance explaining the process for shelf charter applications, the OCC press release announcing the first shelf charter contained an overview of the application process:

- Initially, the OCC will review the qualifications of the proposed management group, the sources and amount of capital that would be available to the bank, and a streamlined business plan describing how the acquired bank will be operated (including compliance with the Community Reinvestment Act).

- With this information, the OCC may grant conditional preliminary approval for a national bank charter, subject to conditions and requirements that the national bank will submit detailed operating plans if the bank targets a specific institution (or specific deposit liabilities and assets) for acquisition.

- If conditional preliminary approval for a national bank charter is granted, the bank is eligible to make proposals to acquire troubled...
institutions, to view the FDIC’s list of failing or troubled institutions, and to submit bids for those institutions.

- Upon receipt of conditional preliminary approval, the bank may commence necessary organizational steps. However, the bank may not begin to engage in any banking business until it receives final OCC approval to do so.

- The OCC will evaluate specific proposals submitted by the bank. If the proposal is deemed acceptable by the OCC, and the FDIC approves the bank’s bid, final charter approval can be granted by the OCC. If the bid is rejected by the FDIC, the charter remains on the shelf for up to 18 months and can be used for other bids.

First "Shelf Charter" Approval – Conditional preliminary approval for the first shelf charter was granted to Ford Group Bank, National Association (the “Bank”), a wholly-owned subsidiary of Ford Group Holdings, Inc., which is a Texas corporation organized to become a bank holding company. The Bank was formed by Ford Group Holdings and its investors primarily to have the opportunity to assume liabilities and purchase assets from the FDIC, in its capacity as receiver of failed depository institutions. The Bank will not commence operations until after its bid for a particular institution is accepted by the FDIC.

The OCC order premises conditional preliminary approval on the understanding that the Bank will apply for Federal Reserve membership, will obtain deposit insurance from the FDIC, and that Ford Group Holdings, along with its lead investor Hilltop Holdings, Inc., will apply to the Federal Reserve Board to become bank holding companies.

The OCC’s order also specifies that “it is anticipated . . . the OCC would grant final approval for the Bank, and approve a purchase and assumption transaction under the Bank Merger Act, the first time that the Bank’s bid to acquire a failed institution is accepted by the FDIC.” Although this provides some assurance that the OCC will approve an initial acquisition, the approval order makes clear that the OCC has the right to alter, suspend, or revoke the conditional preliminary approval “if the OCC deems any interim event warrants such action.”

The OCC order includes a specific condition that, if the Bank receives final OCC approval for an initial acquisition, the bank must enter into, and thereafter implement and adhere to, a written “Operating Agreement” with the OCC, in a form acceptable to OCC. Under the Operating Agreement, the Bank will be required to submit a “Comprehensive Business Plan” that is acceptable to the OCC. Once the Bank has obtained the OCC’s acceptance of the Comprehensive Business Plan (in the form of written OCC non-objection), the Bank must implement and adhere to the Plan as accepted, unless and until it obtains written OCC acceptance of any subsequent, proposed deviations from the Plan.

The OCC order is further conditioned on a number of steps that the Bank must take in order to maintain the OCC’s preliminary conditional approval and in proposing any acquisition, as follows:

Updating Preliminary Information

- The Bank must inform the OCC of any material changes to the preliminary information provided by the Bank, including changes to: (1) the amount and sources of capital available to the Bank; (2) the ownership structure and holding companies over the Bank; (3) the identity, background information, and banking experience of the initial directors and senior executive officers; (4) the overall strategic plan of the organizers and investors for the Bank; and (5) the preliminary business plan outlining intended product and business lines, retail branching plans, and capital, earnings, and liquidity projections. The Bank must

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1 Ford Group Holdings will have several investors, including Hilltop Holdings, Inc., a public company, with approximately $700 million available to invest, and the venture capital funds Flexpoint Overage Fund II, L.P., Flexpoint Ford Fund II, L.P., and Flexpoint Fund L.P., with, respectively, $480 million, $140 million, and $67.5 million to invest.
also notify and periodically update the OCC on the status of the applications with
the FDIC for deposit insurance and with the Federal Reserve for certain investors
to become bank holding companies.

**Initial Acquisition**

- When the Bank first identifies a potential initial acquisition transaction, the Bank
  must promptly notify the OCC in writing of the contemplated initial acquisition
  transaction.

- The Bank’s notice to the OCC must include an “Acquisition Business Plan”
establishing the Bank’s plans for the initial capitalization, operations, and business
of the acquired institution with a focus on the initial period of 60 days after the
acquisition. If the Bank is successful in acquiring the institution, the Bank will be
required to submit a comprehensive long-term business plan.

- The Acquisition Business Plan should include, at a minimum and to the extent the
  information is available and known, (1) the name of the potential acquired
  institution; (2) information regarding the institution’s size, locations, business
  lines and composition, the terms on which the FDIC is offering the institution, the
  type of bid the Bank is contemplating, and the timing of the FDIC’s bid process;
  (3) the amount and composition of capital the investors plan to have in the Bank
  if the bid is successful; (4) the Bank’s assessment of the acquired institution’s
  management; (5) the Bank’s plan to stabilize the acquired institution, in particular
  mitigating deposit run-off, establishing an adequate allowance for loan losses, and
  controlling expenses; (6) the Bank’s assessment of the acquired institution’s
  control structures, risk management function, policies and procedures, technology
  infrastructure, and vendor relationships; the degree to which these processes
  would need to be developed and improved; and how the Bank would accomplish
  such improvements; (7) the Bank’s assessment of the quality of assets and
  business lines that would be acquired; (8) the Bank’s plans for future operations,
  including which business lines of the acquired institution would be continued and
  the projected size of each business line; and (9) a pro forma balance sheet of the
  Bank as of the first day after the acquisition and financial projections for a three
  year period.

- After notifying the OCC of its contemplated initial acquisition transaction and
  submitting the Acquisition Business Plan, the Bank may submit a bid to the FDIC,
  enter into a definitive agreement, submit applications, or otherwise continue its
efforts for the acquisition transaction only after receiving non-objection from the
OCC to continue.

- If the Bank decides to continue with the contemplated initial acquisition
  transaction, the Bank must provide to the OCC (1) a copy of its bid to the FDIC, if
  applicable; (2) a copy of the Purchase and Assumption agreement and any other
  documents used to effect the acquisition; (3) the Bank’s Interagency Bank Merger
  Act application for OCC approval to engage in the purchase and assumption or
  merger; (4) the Bank’s Articles of Association and By-Laws to be in effect after
  consummation of the acquisition; (5) a request for a directors’ residency and/or
citizenship waiver, if required, and an Interagency Biographical and Financial
  Report for any proposed director or senior executive officer not previously
  submitted; and (6) any other information needed to complete the file prior to the
  OCC’s granting final approval.

- If the Bank submits the winning bid to the FDIC or it otherwise becomes clear that
  the Bank will complete the initial acquisition transaction, the Bank shall
  immediately notify the OCC, and update any of the items already submitted.
Post-Acquisition Developments

- Within one business day after consummation of the purchase and assumption for the initial acquisition transaction, the Bank must execute – as discussed above – an Operating Agreement with the OCC, in a form acceptable to the OCC.

- If for any reason the Operating Agreement is not yet in effect after an initial acquisition transaction and the Bank contemplates entering a subsequent acquisition, then the Bank must follow the foregoing procedures for any subsequent acquisition.

In due course, the OCC is expected to release additional information for parties interested in applying for a national bank shelf charter.

**FDIC Expanded Bidder List for Failing Institutions**

On November 26, 2008, the FDIC announced that it was establishing a “modified bidder qualification process” to expand the pool of qualified bidders for the deposit liabilities and assets of failing depository institutions. Interested parties that do not currently have a bank charter will be permitted to participate in the bidding process for failing institutions so long as such parties meet certain requirements, including having received conditional approval for a depository institution charter (e.g., the OCC’s shelf charter) from a federal or state bank regulatory agency and otherwise satisfying applicable FDIC bid criteria. In some situations, conditional approval to establish a bank or thrift holding company will also be necessary. Federal and state agencies are currently working together to determine specific information needs and applicable timing requirements that will ultimately lead to the granting of charter applications and deposit insurance.

As part of the modified qualification process, the FDIC will consider abbreviated information submissions and applications, and may issue conditional approvals for deposit insurance. Although the FDIC is expected to formalize, and indeed clarify, the information it will need to process applications under the modified qualification process, the FDIC has already indicated that the basic areas for consideration under the modified qualification process will include a business plan compliant with the Community Reinvestment Act, readily available capital, and an identified management team subject to financial and biographical review.

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Attorneys in Covington’s Financial Institutions Group have advised many clients on recent financial services and banking developments. The Financial Institutions Group’s expertise derives from advising clients on the impact of such developments over the course of the past three decades. Please do not hesitate to contact any member of our Financial Institutions Group, including the undersigned, should you have any questions.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our financial institutions practice group:

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